CITATIONS

Cases

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IN THE

Supreme Court of the United States

October Term, 1948

No. 277

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
AND SWITCHMEN'S UNION OF NORTH AMERICA
Petitioners,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITIONERS' REPLY BRIEF

Respondent's brief in opposition mentions none of the issues presented by petitioners. Respondent does not discuss the applicability of the *Mine Workers* case (Pet. 8-12), the lack of an equitable or statutory cause of action (id. 12-16), improper venue (id. 16-18), or the undue breadth of the injunction issued against petitioners (id. 18-19). Indeed, while the brief in opposition recognizes the importance of these questions, respondent seeks to avoid present review by this Court on new grounds that,

as matters of fact or law or both, the case is either moot or so infirm that this Court should not exercise its authority under 28 U. S. C. 1254(1). But the circumstances seized upon by respondent warrant no such result. It is for many reasons immaterial that petitioners revoked their strike call pursuant to the restraining order and, during the pendency of this litigation, agreed to accept a settlement from the carriers (Br. in Opp. 2, 6-9).

I.

In the first place, the settlement was involuntary because as the trial court said (2 R. 16):

> It was absolutely necessary that [petitioners] should make some arrangement with their employers. They simply could not go along without making some sort of contract of continuance. * * * For the Court to undertake to take advantage of that situation, which the Court has forced upon them, and to say that the case is now moot and that they cannot have any opportunity to have their rights decided by the higher courts would be not only juvenile, not only immature, but **exceedingly unfair.**

Petitioners had faithfully exhausted, and had more than satisfied, the prolonged "cooling off" procedures under the Railway Labor Act. They had begun their negotiations more than a year previously and had agreed to extra periods for mediation and other procedures designed to prevent a strike (Pet. 4-5). Petitioners meticulously and admittedly obeyed every restraining order and injunction issued in the proceedings (see p. 10 of proceedings in trial court July 29, 1948, a certified copy of which has been filed here). All other railway labor organizations had received beneficial changes in wages, rules, or working conditions (R. 313 *et seq.*). Only railway employees represented by petitioners were required by injunction to continue at their jobs without rules changes or wage increases. It was this situation to which the trial court alluded when it said that

petitioners "simply could not go along without making some sort of contract of continuance" (2 R. 16).

Thus the trial court, though it disagreed with petitioners as to the merits, still thought that petitioners should have their day in court. That they should have that right is much less to be denied if petitioners are correct on the merits. Respondent has not denied the merits of any one of the arguments put forth in the petition and, instead, appears to concede the importance of those issues (Br. in Opp. 8). In other words, respondent brought these proceedings, thereby forced petitioners to make a settlement, does not now deny that the restraining orders and injunctions were improvident, and yet seeks to defeat either all review or at least timely review by this Court. In such circumstances, it seems plain that the cause should not be treated as moot. Cf. *Altvater* v. *Freeman,* 319 U. S. 359, 364-365.

II.

Nor is this case now merely academic as respondent would have it appear. This Court is familiar with the various steps and stages of the processes required under the Railway Labor Act — notice, negotiation, mediation, emergency board proceedings, cooling off periods, or arbitration. See *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711, 722-725. That petitioners revoked their strike call pursuant to the restraining order in this case and, during these proceedings, made a settlement could have no effect upon further "rounds" of proceedings under the Railway Labor Act. Indeed, the very settlement documents upon which respondent now relies to defeat the petition expressly recognize that the further "round" under the Railway Labor Act should not only begin immediately but should have an advanced status (2 R. 23-24, 63; Br. in Opp. 18). The settlement agreement provided (as is customary in such documents) that it was a "full and final settlement"

(2 R. 59; Br. in Opp. 16) precisely so that a new "round" under the Railway Labor Act might begin. Otherwise the negotiations would be merely a continuation of the "round" long previously begun and exhausted prior to the strike call which led to the instant injunction proceedings. That the new "round" so began and is now well along is shown by the affidavit of Messrs. Johnston and Robertson filed herewith and reproduced as an appendix hereto.

Under the foregoing circumstances it cannot be said, as respondent attempts to have this Court say, that review and a decision here would be tantamount to an "advisory opinion" on a hypothetical and speculative set of facts (Br. in Opp. 10), that "the effects of the issuance of the injunction cannot now be undone or in any way remedied" (id.), or that "the possibility of the renewal of circumstances in which [the injunction] would be operative would seem so conjectural as to negate the existence of a genuine controversy" (id. 11). Respondent really means that the present controversy is technically different than the one to which the injunction must be confined (id. 9). Even so, for purposes of the jurisdiction of this Court such distinctions have heretofore been disregarded and should be held for naught now so far as mootness is concerned. *United States* v. *Freight Assn.*, 166 U. S. 290, 307-310; *Southern Pac. Terminal Co.* v. *Interstate Comm. Comm.*, 219 U. S. 498, 514-516; *Southern Pacific Co.* v. *Interstate Comm. Comm.*, 219 U. S. 433, 452; *McGrain* v. *Daugherty*, 273 U. S. 135, 180-182; *Leonard & Leonard* v. *Earle*, 279 U. S. 392, 398; *Newport News Co.* v. *Schauffler*, 303 U. S. 54, 58; *Federal Trade Commission* v. *Goodyear Co.*, 304 U. S. 257.

The *Southern Pac. Terminal Co.* case, for example, involved a suit to enjoin enforcement of an Interstate Commerce Commission order requiring the Terminal Company to cease and desist for a period of two years from granting undue preferences to a particular shipper. The complaint was dismissed in the trial court and the Terminal Company

appealed directly to this Court. The two year period having expired before the case was argued in this Court, the Government contended that the case was moot. This Court held the case not moot because (1) the questions involved in such orders are usually continuing, (2) consideration of those questions "ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review" and (3) interests of a public character were involved (219 U. S. at 515-516). Again, the *Freight Association* case arose from a Government suit to enjoin Sherman Act violations. The District Court dismissed the complaint and the Court of Appeals affirmed. Defendants sought dismissal of the Government's appeal to this Court on the ground that the Association attacked in the suit had been dissolved. This Court held that the case was not moot because of the possibility of future similar conduct by the defendants and the public interest in determining the legality of that conduct.

All of the reasons relied on for those decisions are present here. There is here more than a possibility of renewed controversy between petitioners and the private carriers over wages and working rules. There is also present here the serious danger that, if respondent's position is accepted, consideration by this Court of the important questions of petitioners' right to strike and the jurisdiction of federal courts to enjoin such a strike might be forever defeated. But even if ultimate decision of these questions is merely delayed, petitioners will be grievously affected in a vital right. Both this Court (*American Foundries* v. *Tri-City Council*, 257 U. S. 184) and the Congress (sec. 2, Norris-LaGuardia Act, 29 U. S. C. 102) have recognized that the right to strike is necessary to enable workers to exercise liberty of contract in bargaining with their employers. Petitioners have now been denied that right for a considerable period of time. Denial of this petition by this Court at this time will undoubtedly have profound effect on pending and future negotiations over terms and conditions of

employment. The whole character of future collective bargaining between these parties is dependent on the right of petitioners to strike. Prompt and authoritative determination of that question will most certainly affect the attitudes of both sides in pending and future negotiations. In these circumstances the case is manifestly not moot. Cf. *Southern Pacific Co.* v. *Interstate Comm. Comm.*, 219 U. S. 433, 452.

Moreover, if the foregoing be sound as we think it is, then surely respondent is in error in supposing that it may moot the case by merely moving the discharge of the injunction (Br. in Opp. 11-12). Having curtailed petitioners in their bargaining rights and having forced them to accept a settlement, respondent is in no position to maintain that thereby petitioners have been stripped of their rights to a timely and authoritative decision of the merits of this controversy. The same is true of the return of the carriers to private control (id. 2, 10) because, under these circumstances, the mere return of the properties does not change the underlying character of the controversy nor alter the rights of the parties.

III.

Finally, we think that the novel positions taken by respondent in opposition to the grant of the writ demonstrate the need for an early and final determination of the merits of the controversy. The same delaying and avoiding tactics have been utilized not only in the trial court (2 R. 16) but also in the Court of Appeals (2 R. 9-74). Further, prompt setting and disposition of the cause, as required by the statute, was successfuly resisted by respondent in the court below (2 R. 1-5). Petitioners have, therefore, been under injunctive process and restraint since May 10, 1948 (Pet. 3-4) or some six months. Before this Court may hear and determine the issues on the merits may take

several more months. Meanwhile the legal rights of petitioners and the commands of the expediting statutes (2 R. 1) have been set at naught.

Since respondent has not met the legal issues on their merits here, presumably it would resist decision in the court below on the same technical grounds. Respondent's plea that the present petition should be denied in order that this Court may later have "the benefit of consideration by the court below of the elaborate agreements which the Government contends, and which petitioners deny, have resulted in mootness" (Br. in Opp. 13) is without merit for several reasons. There is nothing elaborate or unusual about the agreements (2 R. 22, 23, 36, 42, 60, 63). At the trial respondent successfully resisted the introduction of evidence as to the history and nature of the underlying dispute (R. 171-172, 174), and hence should not now be permitted to delay the case for that very reason. Again, issues of mootness are customarily determined by appellate courts without remand to some lower court for first consideration. Finally, the issue of mootness has already been passed on by the trial court (2 R. 16); no reason appears why *two* courts should first determine that issue before this Court may act upon it. The reasons set forth by respondent are, therefore, designed to nullify 28 U. S. C. 1254(1) in the circumstances of this case.

So far as we can discover, the present case is the first one in which claims of mootness have been put forth for the purpose of defeating certiorari. Plainly, mootness in itself may not be determined merely in passing upon an application for writ of certiorari because, if on full consideration the Court should conclude that the cause is moot, established procedure is to remand with directions to vacate the judgment and dismiss the complaint. *Berry* v. *Davis*, 242 U. S. 468; *Atherton Mills* v. *Johnston*, 259 U. S. 13; *Brownlow* v. *Schwartz*, 261 U. S. 216, 218; *United States* v. *Anchor Coal Co.*, 279 U. S. 812; *Board of Public Utility*

Commissioners v. *Compania General De Tabacos De Filipinas,* 249 U. S. 425; *Brotherhood of Locomotive Firemen and Enginemen* v. *Toledo, Peoria & W. R. R.,* 332 U. S. 748. There is nothing for the Court to remand unless it first takes jurisdiction. On the other hand, to pass upon mootness without a remand with directions to vacate the decree would subject the parties to risks of res judicata, estoppel by judgment, etc. *Fishgold* v. *Sullivan Corp.,* 328 U. S. 275, 281-283. Furthermore, in view of the special post-judgment proceedings instituted by respondent in this Court and the two courts below, a mere denial of certiorari by this Court will leave the court below in a position in which it will have no means of knowing whether this Court has acted on the merits, on the new issue of mootness, or as a matter of discretion. Thus a cause, already much confused by the newly conceived mootness proceedings initiated by respondent subsequent to the issuance of the permanent injunction, will be further confused and inevitably delayed.

Finally, we think respondent has wandered far from the point of petitions for certiorari. The writ is dependent on the importance of the questions presented, not on the correctness of the judgment below. Here the new issue of mootness, even if regarded as a substantial issue, is simply another issue in the case. So far as it is a substantial issue, it should be subjected to full consideration after briefs and argument in this Court like the other issues in the case. The mootness issue, in the setting of this case, requires the immediate consideration and decision of this Court just as do the other issues. The decision of the court below on this issue, or any other issue in the case, is not likely to be deemed determinative by either party. Intermediate appeal process will merely delay final decision and disposition of the case. Such delay will impair the fundamental rights of hundreds of thousands of railway employees (see Pet. 19-20). Furthermore, it has often been held that a case will not be held moot where public ques-

tions are involved and there is need for their determination to serve as a guide to public officials in future similar matters. *Boise City Irr. & Land Co.* v. *Clark,* 131 Fed. 415, 419 (C. C. A. 9); *Gay Union Corporation* v. *Wallace,* 112 F. 2d 192, 195 (App. D. C.), cert. denied 310 U. S. 647; *Walling* v. *Haile Gold Mines,* 136 F. 2d 102, 105 (C. C. A. 4); *Walling* v. *Mutual Wholesale Food & Supply Co.,* 141 F. 2d 331, 335 (C. C. A. 8); *Howard* v. *Wilbur,* 166 F. 2d 884, 885 (C. C. A. 6).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CARL MCFARLAND
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Counsel for Petitioners

November 1948

APPENDIX

AFFIDAVIT OF ALVANLEY JOHNSTON AND D. B. ROBERTSON

ALVANLEY JOHNSTON and D. B. ROBERTSON, being first duly sworn, depose and say as follows:

That they are respectively the chief executive officers of the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen, two of the petitioners in the above entitled cause; that subsequent to the execution of the agreement and Memorandum of Understanding of August 11, 1948, respecting the disputes giving rise to the controversy in this cause, which are set forth at pages 42-63 of Volume II of the transcript of record herein, the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, and the Switchmen's Union of North America, petitioners herein, have entered into negotiations with substantially all of the Class I rail carriers in the United States concerning a wage request for an increase of pay in the amount referred to in the Memorandum of Understanding dated August 11, 1948, and set forth at page 63 of Volume II of said transcript; that the representatives of these petitioners have held conferences with the representatives of said carriers and that at the present time said conferences have been suspended pending a meeting of the general chairmen of these petitioners representing the employees on said various railroads; that after the meeting of said general chairmen it is expected that conferences with the carriers representatives will be resumed; that if no agreement is reached, the wage dispute will be submitted to mediation under the provisions of the Railway Labor Act; that if no agreement is reached in mediation it is anticipated the matter in dispute will be submitted to an emergency board to be appointed by the President under the provisions of

the Railway Labor Act; and that if the recommendations of such emergency board should not be acceptable to the employees, the threat of a nation-wide strike on the part of the employees, such as gave rise to the instant litigation, may again arise; that the possibility or probability of the recurrence of circumstances which give rise to such or similar threats of strike are not merely speculative or conjectural; that in the year 1943 there was a similar threat of a nation-wide strike by employees represented by the Brotherhood of Locomotive Firemen and Enginemen as a result of which the President of the United States assumed control and operation of all of the principal railroads of the United States; that in the year 1946 there was a nation-wide strike by employees represented by the Brotherhood of Locomotive Engineers; that in May of 1948 there was the threatened nation-wide strike which gave rise to the instant litigation; that in addition to the negotiations as above recited concerning a wage request on behalf of the employees represented by the petitioners herein, there are now actively pending disputes concerning requests for increases in wages and changes in rules and working conditions between sixteen other railway labor organizations and substantially all of the Class I rail carriers of the United States, as a result of which the President of the United States, by Executive Order No. 10,010 on October 18, 1948, appointed an emergency board to investigate said disputes.

That disputes on a nation-wide basis such as referred to above between the representatives of the various crafts or classes of railway employees and the Class I railroads of the country are a recurring process under the Railway Labor Act and reach the stage of strikes or strike threats in most instances before the matter is resolved.